

## **CITY ATTORNEY MEMORANDUM**

**TO:** The Honorable Mayor and City Council

**FROM:** William E. Reischmann, Jr., City Attorney

**DATE:** November 16, 2012

**SUBJECT:** Sunshine Law Compliance in Council Selection Process

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More than five months ago, in accordance with the City Charter, this Council established an open, transparent, and exhaustive step by step process to fill the vacancy in the office of City Council Member, District 2, created by the candidacy and election of the sitting incumbent, Frank Meeker, to the County Commission. Because there have been some newspaper articles criticizing that process as in violation of the Sunshine Law, this memorandum is intended to lay out that process to demonstrate that the Council went above and beyond any legal requirements in making the important decision of appointing a new Council member. In the interest of putting concerns about the process to rest, the following is a discussion of the process and how that process comports with the Sunshine Law, applicable case law and Attorney General opinions.

### **I. COUNCIL'S RATIONALE IN CHOOSING THE SELECTION PROCESS**

The City Charter does not provide a process to select a Council member to fill a vacant seat other than prescribing the timing of selection. State law and case law also do not provide a process. Cities use widely varying methods to fill vacant positions. Many cities do not take applications, do not hold interviews, and often do not even have discussions regarding who is selected to fill a vacant spot; instead, the governing body simply takes a perfunctory vote. Because this Council wanted to allow for public involvement and for transparent decision making, the Council started planning for this vacancy more than five months ago, setting forth a very detailed process to vet potential applicants for the seat. The process started at a public meeting on June 12, where the Council directed Staff to solicit applicants by mail, by newspaper ads, and by notices on the City website, and ended at the sixth public meeting on November 13, with a final selection vote. All of the documents generated were made public.

From the applications received, Council did not appoint a committee to make recommendations, but decided to allow each Council member the time necessary to individually weed through the resumes and letters of interest. The Council members each separately ranked the applicants, and provided that numerical ranking to the City Clerk just hours before a public meeting. The City Clerk tallied up the numbers, and presented the results of that tally to the Council at the November 6 public meeting. The Clerk did not take any action based on the tally, but simply presented the top four finalists to Council at the public meeting, based on her addition of their

numbers. The tally was not used as a substitute for action at a meeting, but was presented for approval at a public meeting.

The Council accepted the rankings, and, on that basis, Staff moved along with the next planned step, consistent with Council direction, which was to set up individual interviews to be conducted on November 13 by Council with the top four applicants, directly followed by a public meeting to discuss final selection. These interviews were not scheduled until after the November 6 public meeting, after Council approval of the four finalists. All six public meetings, June 12, July 31, August 7, August 21, November 6 and November 13, spanning over five months, were of course accessible to any member of the public. All decisions made by Council were made in a public meeting, and all tally sheets were public records. Those sheets show exactly how each Council member ranked each applicant.

## **II. THE PROCESS APPROVED BY COUNCIL**

The following is a timeline of the public meetings leading up to the appointment:

- 1) The series of public meetings to consider a replacement for Frank Meeker's seat began at the June 12, 2012 City Council workshop, a public meeting, where the Council considered what process to choose for the appointment of the new Council member. The Council decided by consensus to use the same process the City had used back in 2008. That process was outlined in an attachment to the workshop agenda. That attachment set forth the timeline for receiving applications, for the numerical ranking of the applicants, for the tallying of the numbers, for interviews, and for the special meeting to select the Council member. Council directed Staff to finalize the timeline and procedure for further consideration at the July 31 public meeting.
- 2) At the July 31, 2012 public meeting, the Staff provided another overview of the proposed procedure, and a power point setting forth details about the selection process. The Council decided to use the same application that the Council has always used for selecting board members. Staff presented the finalized timeline and procedure, in accordance with prior Council direction. The minutes from the July 31 meeting reflect that Council approved the following procedure:
  - Letters would be mailed to all citizens in District 2 who had been involved in City government affairs, or who had contacted the City indicating their interest in the position.
  - Council directed an ad be placed in the newspaper requesting applicants submit resumes. The Clerk was directed to provide copies of all materials received from applicants to Council by the end of October.
  - Council was to review the applications using the Council approved numerical ranking sheet, and submit the ranking sheet to the Clerk by November 5 for compilation of the numbers to determine those with the lowest numbers.
  - All the proposed notices and letters were part of the agenda packet.
  - The top four applicants would be contacted for interviews to be held November 13.

- A special meeting was to be held November 13 for discussion regarding the final selection.
- 3) At the August 7, 2012 public meeting, a citizen asked a question about the vacancy. The Staff and Council had a discussion about who was eligible to fill the vacancy.
  - 4) At the August 21, 2012 public meeting, under Council Comments, the vacancy was again discussed. Council Member Meeker asked about the review of the applications, and the process was reviewed once again.
  - 5) At the November 6 public meeting, under the City Manager's report, the City Manager reminded the Council that 16 people applied for the vacant position, and that Council members had ranked those 16 individuals from 1-16 using the approved form, to create a final four with the four lowest scores, which involved a mathematical computation. The City Manager reminded the Council about the process that had resulted in the tally. The Clerk announced the Council's rankings, based on her addition of their numbers, and stated that, based on the rankings and the previously approved process, there would be interviews set up with four applicants with the lowest numbers. The Clerk announced that the interviews would be held at 9 a.m. on November the 13<sup>th</sup>, just before the 11 a.m. special meeting. The Council, without objection and by consensus, approved this step in the process; i.e., selection of the four applicants with the highest rankings. Individual interviews by each Council member of the final four were then set up for November 13 between 9-11 a.m. No interviews were arranged until after this public meeting, until after this Council and the public had the opportunity to review and approve the results of the Council's rankings.
  - 6) At the November 13 special public meeting, the sixth public meeting where the selection was discussed, the Council again went over the steps in the selection process, and the ranking method, and the addition of the numbers in the ranking sheets. The Council was provided with the tabulation sheet showing all sixteen applicants' numerical scores, and the four finalists, which the Council confirmed for the second time, this time by formal vote (although the Council had approved the tally at the November 6 meeting by consensus, as noted during this meeting). The tally showed how each Council member ranked each applicant. Public comment was invited. Council formally voted to approve the tabulation sheet, which showed the four applicants who were ranked the lowest, and how each Council member ranked all applicants. Council decided to vote again by a formal vote, to emphasize that they had in fact approved the four finalists on November 6. Council then discussed these four candidates, and voted to select an applicant. The Clerk handed out tabulation sheets showing the final vote to select David Ferguson. All sheets were public record and made a part of the minutes.

### **III. LEGAL ANALYSIS TO SUPPORT THE PROCESS**

The Council, City Attorney, and Staff carefully reviewed the process chosen to select a new Council member on many occasions, including at six public meetings, to ensure that the most open transparent process was chosen, going above and beyond any legal requirements. All that

is required by law is for the Council to take a perfunctory vote at a public meeting in favor of an individual to fill a vacancy. As long as that vote is at a public meeting, it can, at Council's discretion, occur with little or no discussion, no interviews, and no disclosure of Council's decision making process. Instead of choosing that route, which effectively precludes public involvement and often results in the selection of a less than qualified applicant, this Council chose an exhaustive process, seeking to involve as many citizens as possible, not only to try to obtain the maximum number of applications, but also to inform their constituents exactly how each council member reached his decision from start to finish. Council took every step at a public meeting.

Because the Charter, the statutes, case law, and attorney general opinions do not set forth a procedure for selecting a council member, research did not yield a case or Attorney General opinion that discusses an appointment method that will meet all requirements under the Sunshine Law, Fla. Stat. 286.011. For this reason, it is necessary to review analogous procedures reviewed in cases and Attorney General Opinions to judge whether the process chosen here meets the Sunshine Law requirements. Under the Sunshine Law, every discussion between Council members that might lead to a decision by a final decision making body like the City Council must be made at a public meeting, as was accomplished here. The process the City followed is somewhat analogous to the process used to evaluate the job performance of a School Superintendent, outlined in Attorney General Opinion 97-23, which the Attorney General opined met the requirements of the Sunshine Law.

Under the facts related in AGO 97-23, each School Board member evaluated the Superintendent in writing, and the forms were then sent to the Superintendent to review. Each individual school board member also met privately with the Superintendent to review the evaluations. The evaluations were then tallied and condensed into a summary, which was approved at a public meeting. This is similar to the process used here, where each City Council member privately reviewed the applications for the Council vacancy, ranking those applicants, and submitting the rankings to the City Clerk. In our situation, the Council members did not even meet privately with the Clerk, City Manager, or with anyone on Staff to review the rankings, making our situation even more solidly compliant with the Sunshine Law than in the Attorney General Opinion. Instead, the quantified/tallied rankings were presented to the Council and the public at the Council meeting on November 6. There was no discussion out of the Sunshine of the tally sheet. The tally did not become official until the public meeting was held.

The Attorney General, in AGO 97-23, indicated that an informational report sent outside a meeting by one member of a Board to inform other members of a subject on a future agenda does not violate the Sunshine Law, if there is no interaction among the Board members before a public meeting. In our situation, once again, the Council did not even circulate the rankings among themselves. There was absolutely no interaction among Council members other than at the public meeting on November 6, since the rankings were just provided to the Clerk the night of November 5, who conveyed the results to the public and the Council at the same time in the public meeting on November 6. The tally was subsequently also approved, again, at the November 13 meeting by formal vote. (In contrast, circulating evaluations of staff by members of a district board to the chairman of that board, outside of a public meeting, to allow the

chairman to convey the evaluations to staff, can constitute a Sunshine violation. *See* Fla. AGO 93-90.)

The Attorney General states in AGO 97-23 that the individual Board members' evaluations could not just be compiled by staff, but had to be considered by the Board as a body. The Attorney General stressed and approved of the fact that the individual evaluations were not circulated among the Board members, and the individual written comments were not considered the final evaluation. Rather, the individual evaluations in AGO 97-23 were compiled into a summary that was then considered at a public meeting, similar to how the Council reviewed the results of the tally on November 6 and November 13. The tally was not circulated to Council before the November 6 meeting, but was considered and acted on at that public meeting. It was only after Council's review at the November 6 meeting that the applicants were contacted to set up the November 13 interviews.

It has been suggested that the City Clerk took unilateral action to decide on the final four. That is incorrect because the Clerk's math in adding up the Council's numbers was approved in two public meetings, one occurring before the final four were contacted. There was no Sunshine Law violation, unlike in *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168 (Fla. 2d DCA 1999), where the court ruled in favor of the city, but stated in dicta that the process followed violated the Sunshine Law. The members of a selection committee evaluating proposals for construction of a municipal building had submitted their written evaluations of six candidates to the city clerk without having a meeting. The clerk, upon finding that the written evaluations pointed to the same three candidates, decided on his own volition, without a meeting, that the committee did not need to meet to select the top three finalists who would present proposals to the City Council. Instead, the clerk simply notified the three finalists of their selection, and told them to present to Council. The selection committee never met after handing in their written evaluations to the Clerk. In reviewing the matter, the court stated:

...there is no question that the committee members' individual evaluations were tallied and acted upon, albeit by the unilateral action of the city clerk, which resulted in three bidders being selected to make presentations to the Council. Therefore, notwithstanding the somewhat unusual facts giving rise to the absence of a meeting, we conclude that the short-listing was formal action that was required to be taken at a public meeting.

*See id.* at 1171.

In the situation in Palm Coast, City Council members individually created their numerical rankings and submitted them to the City Clerk on November 5, without discussing their selections with other Council members, and without circulating their rankings to each other. These were not written narrative evaluations requiring interpretation by the Clerk, only numbers from 1-16. Pursuant to direction given at the June and July meetings, the Clerk created a spreadsheet and used the formulas in the spreadsheet to add the numbers entered by the Council. Unlike *Leach-Wells*, *supra*, where the clerk then took unilateral action to set the presentations at City Council, Palm Coast's City Clerk did not decide on a short list, and she did not notify the top four finalists to set interviews. Instead, the Council held a meeting in the

sunshine on November 6 at which the Clerk's addition of the numbers was presented, and at that time the "short-listing" took place. For the first time, during the public meeting on November 6, the City Council announced the top four candidates selected by the Council with whom Council members would hold interviews. The Clerk acted in a purely ministerial fashion in adding up the numbers, and providing those numbers to Council at the public meeting.

The mere collecting of information by the City Clerk and entering that information into a spreadsheet was a mechanical function. The only action taken by the Clerk was the announcement of the results of the tally and the upcoming interview process at the public meeting. In *Leach-Wells, supra*, "evaluations were tallied and acted upon" by the city clerk, whereas in Palm Coast, the City Clerk simply collected the results on November 5. At that point, however, the finalists had not been selected. The selection was accomplished by the City Council at their November 6 meeting.

In summary, the Council made every decision in the long selection process in the Sunshine. Specifically, the decision to short list the applicants to four finalists was made by the Council, not the City Clerk, at a public meeting held November 6<sup>th</sup>, before the finalists were contacted to be interviewed. This five month process was undertaken to provide the public the benefit of knowing exactly what each Council member was thinking every step of the way. In each of the six public meetings, there was an opportunity for the public to observe and provide input to Council to assist them in making this difficult decision. The process itself was fully vetted and explained in great detail, both orally and in writing, beginning with the very first Council discussion in June of this year, and continuing through last week. Further, the same process was used by Council back in 2008, demonstrating Council's desire to remain consistently transparent to the utmost extent possible throughout this months long decision making process.